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February 24, 1954  
Opinion No. 54-35

TO: Mr. George Bushnell  
Director, Insurance Division  
Corporation Commission  
Capitol Annex Building  
Phoenix, Arizona

RE: Public entities insuring in  
Mutual Insurance Companies.

QUESTION: Due to the great number of con-  
flicting opinions that have  
come out of the Attorney General's  
office in the last twenty years,  
what is the proper procedure for  
the various levels of government  
to take in order to determine  
whether or not they may insure  
in mutual insurance companies?

After a thorough research of the problem, it is the con-  
sidered opinion of this office that the decision as to whether  
a public entity may insure in mutual insurance companies lies  
with the Courts of the State of Arizona. The following case  
laws and other authorities have been thoroughly analyzed by  
this office in arriving at this decision:

BEAVER ST. INS. ASSN v. SMITH  
97 Ore. 579  
192 P. 789 (1920)

BURTON v. SCHOOL DIST. NO. 19  
47 Wyo. 462  
38 P. 2d 610 (1934)

BUTTON v. O. S. STAPLEY CO.  
40 Ariz. 79  
9 P. 2d 1010 (1932)

CLIFTON v. SCHOOL DIST. NO. 14 OF RUSSELLVILLE  
192 Ark. 140  
90 S. W. 2d 508 (1936)

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COMMONWEALTH v. WALTON  
182 Pa. 473

CONTINENTAL FIRE ASSN. v. MASONIC TEMPLE CO.  
26 Tex. Civ. App. 139  
62 S. W. 930 (1901)

COMBES v. GETZ  
285 U. S. 434 (1931)

COWDEN v. WILLIAMS  
32 Ariz. 407  
259 P. 670

CRABTREE v. OLSNESS INS. COMMISSIONER  
Dist. Ct., 4th Dist. of No. Dak.  
Sept. 14, 1929

DALZELL v. BOURBON COUNTY BOARD OF EDUCATION  
193 Ky. 171  
235 S. W. 360 (1921)

DARNELL v. EQUITY L. INS. CO'S RECEIVERS  
179 Ky. 465  
200 S. W. 967 (1918)

DAVIS v. PARCHER, ET AL  
82 Wis. 488  
52 N. W. 771 (1892)

DAY v. BUCKEYE WATER & CONSERVATION DISTRICT  
28 Ariz. 466  
237 P. 636

DOWNING v. SCHOOL DIST. OF CITY OF ERIE  
297 P. 474  
147 Atl. 239 (1929)

FRENCH v. MAYOR, ETC. OF CITY OF MILLVILLE  
66 N. J. L. 392  
49 Atl. 465 (1901)

67 N. J. L. 349  
51 Atl. 1109 (1902)

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FULLER v. LOCKHART

209 N. C. 61  
182 S. E. 733 (1935)

GASTON v. KEEHN

69 Ga. App. 500  
26 S. E. 2d 107 (1943)

GELPCKE v. CITY OF DUBUQUE

68 U. S. (1 Wall.) 175  
17 L. Ed. 520 (1864)

GIVEN v. RETTEN

162 Pa. 638  
29 Atl. 703 (1894)

HATHORN v. CALEF

2 Wall 10  
17 L. Ed. 776 (1864)

IN RE MINNEAPOLIS MUT. FIRE INS. CO.

49 Minn. 291  
51 N. W. 921 (1892)

INTEGRITY MUT. INS. CO. v. BOYS

293 Ill. 307  
127 N. E. 748 (1920)

IONIA E. AND B. FARMERS MT. FIRE INS. CO. v. OTTO

97 Mich. 522  
56 N. W. 755 (1893)

JOHNSON v. SCHOOL DIST. NO. 1 OF MULTNOMAH COUNTY

129 Ore. 9  
270 Pac. 764 (1928)  
Rehearing: 128 Ore. 9  
273 Pac. 386 (1929)

LENIHAM v. SCHOOL DIST. NO. 100

Dist. Ct., 1st Jud. Dist. of Minn.  
August 17, 1931

LEWIS v. INDEPENDENT SCHOOL DISTRICT OF AUSTIN

139 Tex. 83  
161 S. W. 2d 450 (1942)

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LYON v. RATHBONE  
164 N. Y. 10  
58 N. E. 29 (1900)

MACON v. BENSON  
175 Ga. 502  
166 S. E. 26 (1932)

McMAHON v. COONEY  
95 Mont. 138  
25 P. 2d 131 (1933)

MILL OWNER'S MUTUAL FIRE INS. CO. v. BREAKER,  
COUNTY TREASURER  
Dist. Ct., 3d Dist. of Okla.  
September 6, 1935

MILLER v. BARNWELL BROS., INC.  
137 F. 2d 257  
C.C.A. 4th (1943)

MILLER v. JOHNSON  
4 Cal. 2d 265  
48 P. 2d 956 (1935)

PATRONS MUT. FIRE INS. CO. v. BRINKER  
236 Mich. 367  
210 N.W. 329 (1926)

PINK v. A.A.A. Highway Express  
314 U. S. 207  
86 L. Ed. 152 (1941)

SCHOOL DIST. NO. 8, TWIN FALLS COUNTY v. TWIN FALLS  
COUNTY MUTUAL FIRE INSURANCE COMPANY  
30 Idaho 400  
164 Pac. 1174 (1917)

SPRUANCE v. FARMERS' and MERCHANTS' INS. CO.  
9 Colo. 73  
10 P. 285 (1886)

STATE v. MANUFACTURERS MUT. INS. CO.  
91 Mo. 311  
3 S. W. 383 (1887)

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SUMNER COUNTY FARM MUTUAL INS. CO. v. ROGERS  
Dist. Ct. Nashville, Tenn.  
May 7, 1922

SWING v. HUMBIRD  
94 Minn. 1  
101 N. W. 938 (1904)

TAGGART v. GEORGE B. BOOKER & CO.  
3 Ter. 128  
28 Atl. 2d 690, Del (1942)

TAGGART v. WACHTER, HOSKINS AND RUSSELL, INC.  
179 Md. 608  
21 Atl. 2d 141 (1941)

UNION INS. CO. v. HOGE  
21 How. 35, 16 L. Ed. 61 (1859)

WETMORE v. McELROY  
96 S. Car. 182  
80 S. E. 266 (1913)

WILLIAMS, RECEIVER v. LAKEY  
15 How. Pr. (N. Y. ) 206 (1857)

WISCONSIN MUTUAL LIABILITY INS. CO. v. CITY OF GREEN BAY  
Circuit Court, Green Bay, Wisconsin  
October, 1928

LAW CITED

Arizona State Constitution, Article 9, Section 7

Arizona State Constitution, Article 14, Section 11

Section 61-201  
A.C.A. 1939  
1952 Cum. Supp.

Section 61-203, 1,  
A.C.A. 1939

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Section 61-204  
A.C.A. 1939

Section 61-205  
A.C.A. 1939

Section 61-601  
A.C.A. 1939

Section 61-604  
A.C.A. 1939

Section 56-416  
A.C.A. 1939

1 Cooley, Briefs on Insurance  
(2d ed.) 104

1 Cooley, Constitutional Limitations  
(8th ed.) 469 note and 333

3 Dillon, Mun. Corps  
(5th ed.) s976

1 Joyce on Insurance  
(2d ed.) 708

15 McQuillan, Mun. Corps  
(3d ed.) s39.30

Garber, "The Right of School Authorities  
to Insure with Mutual Companies."  
(5th ed.) Law and Admin. 43

Clayton, "Municipal Corporations, Right to  
Insure on Mutual Insurance Organizations"  
14 N. C. Law Rev. 299

Note, 39 Yale Law Journal 430

County Mutuals Act, Laws of 1927, Chapter 100

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F. N. Thorpe, Constitutional  
History of the American People  
(1898), Volume 1, Pages 332-333

The great weight of authority points to the result that a public entity may insure in a mutual insurance company if the mutual insurance company can and does write a non-assessable policy; however, what is a non-assessable policy becomes a fact situation which must be determined under the circumstances of each particular case. Further, there is the question of the interpretation of various statutes in the several states affecting the writing of insurance with mutual insurance companies which have given varying bases to the decisions in the several states that have upheld the right of a public entity to insure in mutual insurance companies. It tends to be an open question in Arizona, as our courts have not indicated in any of their holdings the answer to the question. There have also been a great number of conflicting opinions concerning this matter which have come out of this office since 1926.

An opinion written on May 3, 1932, held that the State may write insurance in mutual companies. This opinion was reversed by an opinion of A. T. LaPrade, Attorney General at that time, on July 25, 1933. Subsequent opinions by this office were written on April 5, 1951, September 6, 1951, and on June 7, 1952.

In view of the apparent lack of judicial expression on this subject as to the law in this state and to determine finally whether a state, county, city, town, school district or any other political subdivision of the State may purchase insurance in mutual insurance companies, it is the considered opinion of this Department that the decision of this matter should and can only be made by the Courts of our State.

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